1995

Alecia Jensen v. Union Pacific Railroad Company : Brief of Appellee

Utah Court of Appeals

J. Clare Williams; Morris O. Haggerty; Attorneys for Appellees.
Allen K. Young; Young & Kester; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

ALECIA JENSEN,	)	
	)	
Plaintiff/Appellant,	)	
vs.	)	APPELLATE COURT NO. 950754-CA
	)	
UNION PACIFIC RAILROAD	)	
COMPANY,	)	PRIORITY NO. 15
	)	
Defendant/Appellee.	)	

BRIEF OF APPELLEE UNION PACIFIC RAILROAD COMPANY

APPEAL FROM THE SUMMARY JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH
The Honorable Boyd L. Park Presiding

ALLEN K. YOUNG, No. A 3583 of
YOUNG & KESTER
Attorneys for Plaintiff/Appellant
406 West 100 South
Springville, Utah 84663
Telephone: (801) 621-3317

J. CLARE WILLIAMS, No. 3490
MORRIS O HAGGERTY, No. 5329
Attorneys for Defendant/Appellee
406 West 100 South
Salt Lake City, Utah 84101-1151
Telephone: (801) 595-3270

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MORRIS O HAGGERTY, No. 5329
Attorneys for Defendant/Appellee
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STATEMENT OF JURISDICTION

The Supreme Court, which has jurisdiction under Utah Code Ann. § 78-2-2(3)(j)(1953 as amended), has assigned this case to the Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Union Pacific believes the issues on review can be stated as follows: (1) Is Alecia Jensen's ("Jensen") claim of negligent train speed preempted by federal law? (2) Was the trial court correct in ruling as a matter of law that the speed of the train, as alleged by Jensen, was not a proximate cause of the accident? (3) Was the trial court correct in ruling as a matter of law that Union Pacific was not responsible for any unsafe conditions which may have been present at the crossing at the time of the accident and which may have created "a more than ordinarily hazardous" crossing? and (4) Was the trial court correct in ruling that there was no genuine issue of material fact in dispute that Union Pacific sounded the train's bell and whistle as it approached the crossing?

Upon review of a grant of a motion for summary judgment, the Appellate Court views the facts in a light most favorable to the losing party below, and gives no deference to the trial court's conclusions of law, which are reviewed for correctness. Blue Cross & Blue Shield v. State, 779 P.2d 634 (Utah 1989).

DETERMINATIVE STATUTES AND REGULATIONS

45 U.S.C.A. § 434 (Federal Rail Safety Act of 1970):

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

49 C.F.R. § 213.9(a): Classes of track: operating speed limits.

> Except as provided in paragraphs (b) and (c) of this section and § § 213.57, 213.59(a), 213.113(a), and 213.137(b) and (c), the following maximum allowable operating speeds apply:

Over track that meets all of the requirements prescribed in this part for--	The maximum allowable operating speed for freight trains is--	The maximum allowable operating speed for passenger trains is--
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90
Class 6 track	110	110

49 C.F R. § 213.9 is set forth in its entirety in Addendum A.

STATEMENT OF THE CASE

Nature of the Case

Union Pacific generally agrees with Jensen's statement of the nature of the case.

Course of Proceedings and Disposition Below

Union Pacific supplements Jensen's statement of the course of proceedings and disposition below as follows:

Union Pacific timely filed its Reply Memorandum on March 8, 1995, arguing, inter alia, that Jensen's expert witness affidavits concerning the speed limit and speed of the train were incompetent, conclusionary, and legally insufficient to raise any genuine issue of fact. In response, Jensen filed a motion on March 14, 1995, for leave to submit an additional expert witness affidavit. Union Pacific responded by filing an objection to the motion on the grounds that that affidavit was also inadmissible because it made legal conclusions, contained inadmissible hearsay testimony, and contained testimony that was irrelevant. The court did not rule on either the motion or the objection concerning the admissibility of such evidence.

Jensen was a passenger in her automobile which was being driven at the time of the accident by her 17 year old boyfriend, Bruce Brinkmeier. Brinkmeier was never included or added as a defendant in the lawsuit; however, on April 10, 1995, Union Pacific filed motion to name him as an additional defendant for the limited purpose of apportioning fault. The trial court did not address this motion.

On April 11, 1995, Union Pacific submitted a Supplemental Reply Memorandum

bringing the Court's attention to a recently discovered group of cases directly supportive of Union Pacific's argument that even assuming, arguendo, a train speed of 1-2 m.p.h. over the effective speed limit, as argued by Jensen, such speed could not possibly have been a proximate cause of the accident. It was on this basis, rather than the argument of federal preemption, that the trial court decided the issue of negligent train speed.

Statement of Facts

Jensen, age 17, was seriously injured when the automobile in which she was riding as a passenger drove in front of and was struck by a Union Pacific coal train. The accident occurred at approximately 12:10 p.m. on February 5, 1994, at a public railroad crossing of Union Pacific's Provo Subdivision mainline trackage located near 650 West and 5950 South in Spanish Fork. [Utah County Sheriff's Investigation File ("Sheriff's File"), R. 143-123].

According to Jensen's Interrogatory Answers (No. 14), Jensen's car, a 1982 Honda Civic, had been purchased and was owned by Danny Jensen, Jensen's father, for Jensen's personal use. The car was being driven at the time of the accident by Jensen's boyfriend, Bruce Brinkmeier, also age 17. Brinkmeier was not licensed to drive an automobile, and received a citation for not being licensed following the accident. (Sheriff's File, R. 143-123).

The train was traveling from Milford to Provo in a southwest to northeast direction. The trackage at the location of the crossing is relatively straight and flat. The road (650 West) travels in a north/south direction and the car was traveling southbound. The road is straight and flat for hundreds of feet before reaching the crossing. The trackage and road intersect at a greater that 90° angle with reference to the directions of approach for the train

and car. [Sheriff's File, R. 143-123; Lawrence Curley Affidavit ("Curley Affidavit") with appended diagram and photographs, R. 121-106].

The crossing is located in a rural farming area and is surrounded by open fields on the approach side. A Utah Livestock Auction building and animal pens are located in the southwest quadrant of the crossing intersection, which is on the opposite side of the tracks from which Jensen's automobile approached. The building and pens are located off the railroad right of way. The northwest quadrant of the crossing intersection, which is the view quadrant for the approaching train and car, is an open field. (Curley Affidavit, R. 121-106; Aerial photograph, R. 104).

650 West is an asphalted road and the railroad crossing was planked and asphalted. An advance stop sign warning sign was posted along side 650 West at approximately 572 feet north of the crossing. An advance railroad crossing warning sign was posted along side the road at approximately 332 feet north of the crossing. An advance railroad crossing warning sign was painted on the road surface at approximately 281 feet north of the crossing. Another railroad crossing warning sign, somewhat faded but still observable, was painted on the road surface at approximately 175 feet north of the crossing. Stop signs and railroad crossing "crossbuck" signs were located on both sides of the crossing. The stop and crossbuck signs on the north side were located approximately 17 and 9 1/2 feet, respectively, away from the tracks. White stop sign stop lines were painted on the roadway surface on both sides of the crossing approximately 22 feet away from the tracks. All of these signs, with the possible exception of the second painted road sign, were in excellent condition and

easily visible to motorists approaching the crossing in a southbound direction. (Curley Affidavit, R. 121-106).

The train was an empty coal train with three locomotives and 46 trailing empty coal cars. The train weighed 1424 tons and was 2622 feet in length. The locomotives were painted yellow and ranged in height from 15 1/2 feet to a little over 16 feet. The total length of the three yellow locomotives which were coupled end to end was approximately 200 feet. [Curley Affidavit, R. 121-106; Ryan Puffer Affidavit ("Puffer Affidavit"), R. 102-98].

The federally set speed limit for the trackage and train in question was 60 m.p.h. By means of an internal "Timetable" rule, Union Pacific had voluntarily imposed a 50 m.p.h. speed limit for its freight trains. [49 C.F.R. § 213.9(a), R. 88-87; William VanTrump Affidavit ("VanTrump Affidavit"), R. 96-95; Puffer Affidavit, R. 102-98].

Ryan Puffer was the engineer of the train and was controlling the train's movements from the cab of the leading locomotive. He was operating the train at approximately 50 m.p.h. as the train approached the crossing and at the time he placed the train into emergency braking just before the accident. He monitored the train speed by means of a speedometer in the cab of the leading locomotive. [Puffer Affidavit, R. 102-98; George Ohlsson Affidavit ("Ohlsson Affidavit"), R. 93-90].

Federal law found at 49 C.F.R. § 229.117 (Addendum C), requires every locomotive operating in excess of 20 m.p.h. to be equipped with a "speed indicator" accurate within ± 5 m.p.h. at speeds above 30 m.p.h. One of the train's locomotives (No. 3799) was equipped with such a speed indicator, which is sometimes referred to as a "speed recorder" or "event

recorder." A tape printed out from the speed indicator device shows the train to be traveling between 49 and 51 m.p.h. for at least the last three miles before braking was initiated. (Ohlsson Affidavit, R. 93-90).

The speed indicator on locomotive 3799 was of the older "8 track" cassette type which does not have sufficient channels to record the operation of the whistle. While the speed indicator printout tape has a "horn" line where whistle activation can be shown if recorded by the device, the speed indicator was not equipped to make such a recording. (Ohlsson Affidavit, R. 90). Accordingly, the fact that there are no printout markings on the horn line is not evidence that the whistle was not sounded. It is evidence only that the speed indicator was not capable of making the whistle recording. [Supplemental Affidavit of George Ohlsson ("Supplemental Ohlsson Affidavit"), R. 259-257].

The leading locomotive (No. 9390), was equipped with two headlights which were operating on high beam as the train approached the crossing. (Puffer Affidavit, R. 102-98; Curley Affidavit, R. 121-106).

Engineer Puffer was sounding the locomotive whistle and bell as the train approached the crossing. He began sounding the whistle and bell approximately 1/4 mile away from the 5950 South crossing and continued to sound the whistle and bell from the 5950 South crossing on up to the point of the accident at 650 West. The distance between the 5950 South and 650 West crossings is approximately 1100 feet. (Puffer Affidavit, R. 102-98 Sheriff's File, R. 143-123; Curley Affidavit, R. 121-106).

At about the time the train passed over the 5950 South crossing, Engineer Puffer

noticed a truck pulling a horse trailer begin to drive over the tracks in a southbound direction. Puffer focused his attention on the truck/horse trailer to make certain that it would get out of the way. Puffer was sounding the whistle and bell as he watched the truck/horse trailer drive over the crossing. (Puffer Affidavit, R. 102-98; Sheriff's File, R. 143-123.)

The whistle and bell were operating properly and the whistle was a particularly loud whistle. The locomotive bell was also ringing. Engineer Puffer turned the bell on when he started sounding the whistle for the 5950 South crossing. He never turned the bell off until after the accident. Puffer operated the whistle and bell continuously from more than one quarter mile away up to the point of the accident. (Puffer Affidavit, R. 102-98).

Shortly after seeing the truck/horse trailer clear the crossing, Puffer noticed the Jensen car rolling towards the crossing. The car was following a few seconds behind the truck/horse trailer and moving past the stop sign. Puffer had the impression that the car never stopped for the stop sign. The car rolled onto the track directly in front of the train. (Puffer Affidavit, R. 102-98; Sheriff's File, R. 143-123).

The train was a few hundred feet from the crossing when engineer Puffer first saw the Jensen car approaching the crossing. Puffer placed the train into emergency braking immediately upon seeing the Jensen car. (Puffer Affidavit, R. 102-98).

According to Jensen's Interrogatory Answers (Nos. 15 and 35), Brinkmeier and Jensen had come from Brinkmeier's home in Salt Lake City, with Brinkmeier driving, to the place of the accident. The purpose of the drive was to visit Brinkmeier's foster parents who lived in the area and to see where Brinkmeier had worked just north of the crossing.

Brinkmeier's deposition was never taken nor did he give an affidavit. However according to a recorded statement of Brinkmeier, a transcription of which was attached as an exhibit to Jensen's Memorandum in Opposition to Union Pacific's Motion (R. 178-158), Brinkmeier and Jensen were playing a "wish" game upon arrival at the crossing. They did so by lifting their feet up off the floor of the car and touching something metallic with their fingers while at the same time making a wish and crossing the tracks. Jensen agrees that they may have been playing this game. [Brinkmeier Statement, R. 168-166; Affidavit of Alecia Jensen ("Jensen Affidavit"), R. 181-180].

Brinkmeier and Jensen never saw nor heard the train at any time before impact. They were playing the game and looking in a forward and/or upward direction to try and find a metal screw to touch as the car was at or near the stop sign. They did not look or listen for train traffic because of being preoccupied with playing the game. (Jensen Affidavit, R. 181-180; Sheriff's File, R. 143-123).

In Jensen's Answer to Interrogatory No. 25, which specifically requested that she identify "any and all obstructions to your vision of the train's approach and railroad crossing," Jensen answered: "I do not recall if the view was obstructed. " (R. 265). In her subsequent affidavit response to Union Pacific's Motion for Summary Judgment, Jensen recalled "that there were a lot of trucks and trailers which obstructed our view of the tracks in all directions." (Jensen Affidavit, R. 181).

In Jensen's Answer to Interrogatory No. 26, responding to the question of how the accident happened, she stated: "I remember nothing of the accident and very little, if

anything, of what happened prior to the accident." (R. 218). In her affidavit later submitted in opposition to Union Pacific's motion, Jensen stated that she did not recall playing the wish game (but may have been); but did remember traffic congestion at the crossing which obstructed the view of the tracks in all directions; and did recall never hearing or seeing the train. (Jensen Affidavit, R. 181-180). This is Jensen's only evidence of noise and traffic congestion at the crossing.

Brinkmeier, in his recorded statement attached to Jensen's Memorandum in Opposition, stated that he was "not paying attention" at the crossing and "never heard anything." (R. 164).

Independent witnesses Gerald and Whitney Hill and Johnny Starks were interviewed by the Utah County Sheriff's Office. They provided written statements to the Sheriff's Office but no depositions or affidavits were obtained in the lawsuit. The Hills made no reference to whether the whistle was or was not sounded--the subject was not addressed at all. However, Starks advised that, "I heard the train honking." (Sheriff's File, R. 139, 135, 134, 131).

In addition to being cited for not having a driver's license, Brinkmeier was also cited for "failure to stop at stop sign." (Sheriff's File, R. 143-123).

Emergency braking is the quickest way to stop a train, but because the car was so close, it was not possible to slow the train before impact. It took the train approximately 1400 feet to stop after emergency braking was initiated. The brakes operated normally and the stop was a good one under the circumstances. It was not possible for engineer Puffer to stop

the train any quicker. Puffer did everything within his power to warn of the train's approach and to stop the train after suddenly perceiving that the car may not stop. (Puffer Affidavit, R. 102-98; Curley Affidavit, R. 121-106).

The left side of the snowplow of the leading locomotive struck the right front portion of the Jensen car, throwing it in a northeasterly direction. Both occupants were ejected from the car and thrown in the same northeasterly direction. Neither occupant was wearing a seat belt. (Sheriff's File, R. 143-123; Curley Affidavit, R. 121-106; Puffer's Affidavit, R. 102-98).

SUMMARY OF ARGUMENTS

1. There is no factual dispute that the train's speed was in the range of 49-52 m.p.h. at the time of the accident. Such speed is not unreasonable, excessive or negligent as a matter of law since it is within the 60 m.p.h. limit established by the Federal Railroad Administration ("FRA") in 49 C.F.R. 213.9(a), which limit preempts any common law claim that the train should have been traveling at a slower speed. The 60 m.p.h. speed limit specified in § 213.9(a) preempts any claim of excessive speed based upon Union Pacific's timetable speed limit of 50 m.p.h. which was a limit voluntarily set by the Railroad and does not have the effect of an enforceable regulation and cannot be used as the basis for a negligent speed claim. In any event, a speed of 51 or 52 m.p.h. cannot be considered as violating even the Railroad's timetable limit of 50 m.p.h. in view of the ± 5 m.p.h. variation required by 49 C.F.R. 229.117, nor can a speed of 1-2 m.p.h. over the speed limit, whatever

it was, be considered a proximate cause of the accident as a matter of law.

2. Jensen offered no probative evidence that Union Pacific did not comply with the whistle statute, and no genuine issue of material fact exists on that issue. Jensen's affidavit testimony that she did not hear the whistle is not admissible or probative because it contradicts her earlier interrogatory answer, and because it is negative testimony. The unverified and unsworn statements of Jensen's other "whistle witnesses" are inadmissible and not probative of the issue of whether the whistle was sounded. The speed indicator printout is not evidence that the whistle was not sounded--only that the speed indicator did not record the whistle. The only admissible, probative evidence on this issue is the affidavit testimony of Engineer Puffer who is very clear that the whistle was appropriate sounded.

3. Jensen offered no probative evidence that the crossing was more than ordinarily hazardous. Her affidavit testimony of obstructions to view should be disregarded because it contradicts her earlier answers to interrogatories. The law imposed no duty of additional care on Union Pacific with respect to the condition of the crossing or handling of the train. The obstructions, if any, created by the Utah Livestock Auction premises were off the right of way and not under Union Pacific's control, and as a matter of law, Union Pacific had no duty to signalize the crossing or reduce any further the speed of the train under the federally mandated speed limit.

ARGUMENT

I.

JENSEN'S CLAIM OF NEGLIGENT TRAIN SPEED IS PREEMPTED BY FEDERAL LAW.

The "authorized speed limit" for the train and trackage in question was set by the Federal Railroad Administration at 60 m.p.h., 49 C.F.R. § 213.9(a), and such limit preempts Jensen's claim of excessive train speed as a matter of law. CSX Transp., Inc. v. Easterwood, 113 S.Ct. 732; 123 L.Ed.2d 387 (1993). In Easterwood, the plaintiff sued for the death of her husband caused in a railroad crossing accident, alleging the same common law negligence claims made by Jensen, of excessive train speed and a crossing that was unsafe. CSX argued, inter alia, that plaintiff's claim of excessive train speed was preempted under 49 C.F.R. § 213.9(a), and the Supreme Court agreed. In rendering its decision, the Supreme Court clarified the extent to which federal railroad safety laws and regulations preempt state laws concerning train movements. The Court held that federal regulations implemented pursuant to the Federal Rail Safety Act of 1970, 45 U.S.C. § 434, may preempt any state law, rule, etc., including, "legal duties imposed on railroads by the common law," 123 L.Ed.2d at 396; and that plaintiff's common law negligence allegation of excessive train speed was preempted by the maximum speed limits established by the FRA. The Court stated:

> On their face, the provisions of § 213.9(a) address only the maximum speeds at which trains are permitted to travel given the nature of the track on which they operate. Nevertheless, related safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track

> conditions were taken into account. Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort which respondent seeks to impose on petitioner.

123 L.Ed.2d at 402-03. Subsequent federal district court decisions, following Easterwood, have further interpreted 49 C.F.R. § 213.9(a) to preempt state common law claims based upon a railroad's violation of its "internal policies" requiring adherence to municipal speed restrictions, Bowman v. Norfolk Southern Ry. Co., 832 F.Supp. 1014, 1017 (D.S.C. 1993); and state common law claims based upon a railroad's violation of local speed ordinances, Id.; Landrum v. Norfolk Southern Corp., 836 F.Supp. 373, 375 (S.D. Miss. 1993).

In the present case it is undisputed that the train was operating within the federally set speed limit of 60 m.p.h. The fact that Union Pacific had voluntarily set a lower "internal policy" timetable speed limit of 50 m.p.h. is irrelevant since any claim based upon a violation of the railroad set limit is still a state common law negligence claim which is preempted by 49 C.F.R. § 213.9(a). Id.. Accordingly, since the issue of train speed limits has been specifically preempted by federal law and Union Pacific's train was operating within the federal limit, the train's speed, whether it was 49, 50, 51 or 52 m.p.h. cannot provide a basis for Jensen arguing a state common law negligence theory.

1. 49 C.F.R. § 217 Does Not Authorize Timetables to Change the Federal Speed Limits Set in 49 C.F.R. § 213.9.

In an effort to circumvent the defense of federal preemption of train speed limits, Jensen argues that since 49 C.F.R. § 217 (actually § 217.7) (Addendum B) requires railroad

timetables be filed with the FRA, § 217.7 thereby makes Union Pacific's timetable speed of 50 m.p.h. the enforceable federal speed limit in this case. While § 217.7 does require railroads to file their operating rules and timetables, etc., with the FRA, it says nothing about the provisions of such rules becoming enforceable federal regulations or that timetable speed limits filed with the FRA under this section preempt or become an exception to the speed limits specifically set by 49 C.F.R. § 213.9(a).

Realizing that § 217.7 makes no such provision or mention, Jensen offered the affidavits of Bruce Reading and Robert Hitson to inappropriately make the erroneous legal conclusions that railroad speed limits filed with the FRA under § 217.7 become enforceable federal regulations. Such testimony is inadmissible under Rule 704, Utah Rules of Evidence, which does not allow a witness, expert or not, to give legal conclusions. Davidson v. Prince, 813 P.2d 1225 (Utah Ct. App.), cert. denied, 826 P.2d 651 (Utah 1991). Clearly, Bruce Readings' assertion that the federal speed limits set in 49 C.F.R. § 213.9(a) are "clarified and restricted" by 49 C.F.R. § 217, is a legal conclusion and should be disregarded. The case of Wright v. Illinois Central R. Co. 868 F.Supp. 183 (S.D. Miss. 1994) is directly in point. There, plaintiffs alleged that the railroad was negligent in "operating its train at an excessive speed just prior to and at the time of the collision." The passenger train was traveling 79 m.p.h. which was within the FRA speed limit of 80 m.p.h. [as set forth in 49 C.F.R. § 231.9(a)], but in excess of the limit set by a municipal speed ordinance. The Railroad's "internal policies" (undoubtedly found in the Railroad's operating rules or timetable), required the Railroad to comply with municipal speed ordinances. In support of their

argument that the Railroad was negligent for violating the municipal speed limit, plaintiffs offered the conclusionary testimony of an expert witness that the FRA regulations pertained only to "open tracks, and not to tracks within municipal or residential districts;" thus, the regulations did not preempt plaintiffs' claim. Id. at 187. In ruling that the expert's testimony was a legal conclusion and did "not create a genuine issue of material fact," the Court stated:

> This assertion by [the expert] is unsupported by law or statute, and amounts to no more than the legal conclusion of a plaintiff's witness, which is inadmissible to defeat a summary judgment motion. [Citations omitted]. ("Unsupported . . . affidavits setting forth ultimate or conclusionary facts and conclusions of law are insufficient to either support or defeat a motion for summary judgment.") [Citations omitted]. A reading of 49 C.F.R. § 213.9(a) discloses no mention of an "open countryside" exception for tracks in urban areas. The Court holds that the conclusionary allegations of plaintiff's experts on this issue fail to create a genuine issue of material fact sufficient to withstand defendant's motion for summary judgment.

868 F.Supp. at 187. Likewise, here, the FRA regulations [both § 213.9(a) and § 217.7] make no mention of a timetable speed limit exception to the maximum speed limits set in 49 C.F.R. § 213.9(a), and plaintiff's expert witnesses cannot be heard to "rule" to the contrary. A railroad's "internal policies" regarding train speed, whether they are to abide municipal speed ordinances and/or railroad timetable speed limit restrictions, which are inconsistent with the preemptive and controlling FRA regulations, are irrelevant and cannot be relied upon to create issues of negligence against the Railroad.

Furthermore, the case of Southern Pacific Trans. Co. Public Utilities Commission of Oregon, 9 F.3d 807 (9th Cir. 1993) has specifically ruled that railroad rules filed pursuant to § 217.7 do not thereby become federal laws. In that case an Oregon law permitted local

authorities to ban the sounding of locomotive whistles under certain conditions. Desiring for safety reasons to be able to continue sounding whistles, Southern Pacific argued that the state law was preempted by a number of federal regulations, including 49 C.F.R. § 217 which, it argued, required federal filing of the railroad's operating rules pertaining to the sounding of whistles, thereby raising such rules to the level of federal law. The Ninth Circuit disagreed, ruling that although rules are required to be filed with the FRA, "because the FRA neither approves nor adopts the railroads' rules in any manner [only requires they be filed], the rules do not have the force of law and therefore cannot preempt the Oregon statute." 9 F.3d at 81, n. 5. Accordingly, if Southern Pacific's internal operating rules which require the sounding of a whistle at railroad crossings and which are required to be filed with the FRA under 49 C.F.R. § 217 do not have the "force of law," neither does Union Pacific's timetable speed limit in the case at bar.

2. The Train Was Traveling Within the Timetable Speed Limit of 50 m.p.h.

49 C.F.R. § 229.117 (Addendum C) requires every locomotive operating in excess of 20 m.p.h. to be equipped with a "speed indicator" accurate within ± 3 m.p.h. at speeds of 10-30 m.p.h., and accurate within 5 m.p.h. at speeds above 30 m.p.h. These federal accuracy standards recognize the inherent variables in locomotive speed indicators referred to by Union Pacific's expert witness, George Ohlsson (R.93-90). Such standards preempt any argument of excessive speed as long as the speed is within the variables allowed. Accordingly, here any speed shown on the speed indicator printout up to and including 55

m.p.h. would be an allowable variable under 49 C.F.R. § 229.117. Therefore, not only was the train traveling within the controlling federal speed limit of 60 m.p.h., but it was also traveling within the timetable limit of 50 m.p.h. as that limit must be interpreted by factoring in the 5 m.p.h. variable allowed by § 229.117. To rule otherwise would be to inappropriately assume that the speed indicator was precisely accurate when in fact the actual speed may have been well below 50 m.p.h.

II.

EVEN ASSUMING, ARGUENDO, THAT THE TIMETABLE SPEED LIMIT OF 50 M.P.H. WAS THE ENFORCEABLE LIMIT, THE TRAIN'S SPEED WAS NOT A PROXIMATE CAUSE OF THE ACCIDENT.

Even though the trial court agreed, at pp. 9-10 of its Memorandum Decision, that as a matter of law Union Pacific's timetable speed limit of 50 m.p.h. did not have the force and effect of federal law under 49 C.F.R. § 217, the Court chose to decide the speed issue on the basis of proximate cause.

It is Hornbook Law that excessive speed is judicially significant only where it is the proximate cause of the accident; and that an unlawful speed is not causal merely because it places a vehicle at a particular place at a particular time--it is only causal where it prevents or retards the operator from slowing down, stopping or otherwise controlling the train or vehicle so as to avoid the collision; or where it misleads the driver of the other vehicle. Blashfield Automobile Law and Practice, Vol. 2, § 105.6, pp. 313-318; Dombeck v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 129 N.W.2d 185 (Wisc. 1964); Horsley v. Robinson,

186 P.2d 592 (Utah 1947); O'Malley v. Eagan, 2 P.2d 1063 (Wyo. 1931); Whiffin v. Union Pacific R. Co., 89 P.2d 540 (Idaho 1949).

Dombeck v. Chicago, Milwaukee, St. Paul & Pacific R. Co., supra, which the trial court found directly in point, is decisive of this issue. There, the driver of the automobile saw the train at the last minute and tried to accelerate over the crossing in front of the train because the road was too slippery to stop. The plaintiffs argued, inter alia, that the railroad was negligent in allowing its train to travel 25 m.p.h. over the railroad's timetable speed limit of 40 m.p.h. In ruling that even 25 m.p.h. over the speed limit could not have been a proximate cause of the accident, the Court stated:

> Notwithstanding the evidence as to speed we conclude that under the facts of this case, assuming that the speed of the train was negligent, such speed as a matter of law could not be causal. In order to be causal the train's speed must either have misled Richard Dombeck, the driver of the car, or it must have interfered with the control and management of the train to the extent of rendering it probable that such control and management would have otherwise been effective to have avoided the collision. The evidence here excludes both of these hypotheses.
>
> Richard's testimony clearly excludes the possibility that he was misled as to the speed of the train and that he attempted to cross in front of it on reliance that it was traveling at a lesser speed than it actually was.
>
> . . .
>
> . . . the reason Richard attempted to cross the track by accelerating instead of trying to stop was because he had concluded that he could not stop before reaching the track. Speed is not causal merely because the train arrived at the crossing the instant it did while if it had been going slower the car might have safely crossed ahead of it. [Citation omitted].

. . .

> . . . There is no evidence in the record that the application of the emergency brakes at a point 30 feet from the crossing would have reduced the train's speed sufficiently to have avoided the collision. We think the probabilities are that it would not. In any event, a jury should not be permitted to speculate as to this. The situation is different with respect to the operation of automobiles where it can be assumed that jurors possess some knowledge of stopping distances and effectiveness of automobile brakes. This is not the situation with respect to the operation and stopping of trains.
>
> Therefore, we conclude that the trial court did not err in failing to submit a jury question as to the train's speed since the evidence could not support a finding that any such speed was causal.

129 N.W.2d at 192-93 (Emphasis added). Likewise, here, the speed of the train, regardless of whether it was 49, 50, 51 or 52 m.p.h., could not possibly have been a proximate cause of the accident. There is no dispute that Jensen and Brinkmeier never looked for, listened for, saw or heard the train prior to impact--they were both totally oblivious to the presence of the train. Therefore, neither could have been mislead as to the speed of the train since they had no idea what that speed was.

Furthermore, Jensen made no argument nor produced any evidence to the effect that had the train been traveling 1-2 m.p.h. slower at the time Engineer Puffer activated the emergency brakes, it could have been stopped or at least slowed sufficiently to have allowed Jensen's automobile to pass safely over the crossing. Indeed, common sense as well as the only evidence on the issue is directly to the contrary. Engineer Puffer at p. 4 of his Affidavit (R. 99), testified that a train such as the one he was operating at the time of the accident

"takes a number of seconds, after placing it into emergency braking, before it even begins to slow down. On this occasion the train did not even begin to slow down before the accident happened." George Ohlsson testified at p. 3 of his Affidavit (R. 91), that a small difference of a few miles per hour "would not have made any significant difference in terms of how far the train would have gone before slowing down or stopping after the brakes were applied;" and that "a matter of 1 m.p.h. for a train this long and heavy and traveling at this speed is, in my opinion, insignificant in terms of stopping time and distance". Such testimony is supported by explanations provided by the Utah Supreme Court in other crossing accident cases. For example, in Van Waggoner v. Union Pacific R., 186 P.2d 293 (Utah 1947), the Utah Supreme Court explained:

> Because of the weight of trains, the impossibility of stopping within short distances, and the impossibility of turning to avoid objects in its path, the same right of way rule does not apply as in the case of two automobiles. Trains cannot be stopped in time to avoid collisions if the time interval is shortened to a matter of . . . seconds

186 P.2d at 300-301. And in Gregory v. Denver & R.G.W. R., 329 P.2d 407 (Utah 1958), the court said:

> It is contrary to the generally known laws of physics and common sense to expect a train, with its great weight and momentum to stop within the short distance available after the instant it should have become apparent that Gregory was not going to stop. After that point was reached, there is nothing a crew could have done to avoid the collision. And this is true whether the train was traveling fast or slow and whether the crew saw him or not.

329 P.2d at 409.

Jensen erroneously applies a "but for" test in arguing that an allegedly excessive train speed of 1-2 m.p.h. imposes liability on Union Pacific. The test is one of proximate cause,

not cause in fact. Were it not so, as stated by Prosser, "the consequences of an act [would] go forward to eternity, and the causes of an event [would] go back to the discovery of America and beyond." Prosser, Law of Torts (4th Ed. 1982), Chap. 7, p. 236. Under the circumstances of the accident, the speed of Union Pacific's train, regardless of whether it was 49 or 52 m.p.h., was merely a condition of the accident, as was Jensen's getting out of bed in the morning, and extremely remote in the change of causation. Therefore, even assuming, arguendo, that the enforceable speed limit was the timetable limit of 50 m.p.h., a speed of 1 or 2 m.p.h. in excess thereof could not have been a proximate cause of the accident as a matter of law.

III.

JENSEN DID NOT RAISE A GENUINE ISSUE OF MATERIAL FACT CONCERNING WHETHER UNION PACIFIC COMPLIED WITH THE REQUIREMENTS OF UTAH CODE ANN. § 56-1-14 IN SOUNDING THE TRAIN'S WHISTLE AND BELL.

1. Jensen's Affidavit Is Inconsistent With Her Previous Testimony.

Jensen's statement in her affidavit, submitted in opposition to Union Pacific's motion, that she "did not hear the train blow its whistle or sound its horn anytime prior to the collision" is inconsistent with her earlier Answer to Interrogatory No. 26, that she did not remember what happened. Since a party may not rely on a subsequent affidavit that contradicts prior sworn testimony in order to create an issue of fact, Jensen's affidavit testimony that she did not hear the whistle should be disregarded. Webster v. Sill, 675 P.2d 1170 (Utah 1983); Gaw v. State, 798 P.2d 1130 (Utah Ct. App. 1990).

2. Jensen's Statement In Her Affidavit That She Did Not Hear The Whistle Is Not Probative Evidence.

Jensen does not testify in her affidavit that the whistle was not sounded--only that she did not hear it. Such a statement is considered "negative" testimony and, without more, is not sufficiently probative to raise an issue of fact regarding whether the whistle was blown, in the face of the positive testimony set forth in the affidavit of Engineer Puffer that he did, in fact, sound the whistle. In order for Jensen's testimony to rise to the level of positive testimony sufficient to raise a question of fact, she must lay an appropriate foundation by additionally testifying that not only was she in a physical position to hear the whistle, but also that she was paying sufficient attention that she would have heard the whistle had it been sounded. Hudson v. Union Pacific RR, 233 P.2d 357 (Utah 1951); Seabold v. Union Pacific RR, 239 P.2d 175 (Utah 1951); Bebout v. Norfolk & Western Ry. Co., 982 F.2d 1178 (7th Cir. 1993). Jensen did not lay that kind of foundation in her affidavit. In view of her earlier testimony that she remembered little if anything of the events leading up to the accident, and admission that she may have been involved in playing the "wish game" with Bruce Brinkmeier, Jensen cannot do so now. The fact that she did not hear any whistle even though others did, including independent witnesses, is supportive of the fact that Jensen was not paying attention.

3. Bruce Brinkmeier's Statement Is Not Probative Evidence.

For the same reasons set forth in paragraph III.2 above, Bruce Brinkmeier's unsworn negative statement that he did not hear the whistle does not raise an issue of fact concerning

whether the whistle was blown. As stated at p. 15 of his statement submitted by Jensen (R. 164):

> CR--(Claim Representative) Did you hear any trains coming?
>
> I--(Interviewee) Nope, I didn't hear the train or a horn.
>
> CR--You weren't paying attention for any train horns, do you know or . . . . . ?
>
> I--Oh, I'm sure I was subconsciously, but not paying attention.
>
> CR--Right.
>
> I--But the people, the witnesses at the auction, said that he was blowing his horn from a ways back.
>
> CR--Right.
>
> I--But I never heard anything.

Not only does Brinkmeier admit that he never heard the whistle, but he also admits that he was not listening or paying attention. Thus, he impliedly admits that the whistle could have been sounded--he just didn't hear it. His statement is negative testimony and cannot be changed into positive testimony since he cannot meet the second portion of the two-pronged foundational test of paying sufficient attention.

In any event, Brinkmeier's statement is not in affidavit form and is not, therefore, competent to raise an issue of fact in the face of Engineer Puffer's Affidavit that the whistle was sounded. It is clear that when a motion for summary judgment is filed and supported by Affidavit, the party opposing the motion has an affirmative duty to respond with affidavits or other materials allowed by Rule 56(e), U.R.C.P. Brinkmeier's unverified and unsworn

statement that he did not hear the whistle should be disregarded. D & L Supply v. Saurini, 775 P.2d 420 (Utah 1989).

4. The Statements Of Gerald and Whitney Hill Are Not Probative Evidence That Union Pacific Did Not Comply With The Whistle Statute.

The Hills make no reference to the whistle one way or the other--the subject simply was not addressed. A failure to make mention that the whistle was sounded does not provide a basis for arguing that it was not. If it did, by the same reasoning Union Pacific could argue that a failure to mention that the whistle was not sounded gives rise to the implication that it was. For obvious reasons, including the fact that the statements are not in affidavit or deposition form, the testimony of Gerald and Whitney Hill is not evidence on the issue of whether the whistle was blown for the statutory distance or at all. The statements should be disregarded on this issue.

Union Pacific also notes that in mentioning the Hills' failure to say that the whistle was sounded, Jensen selectively overlooks the statement from independent eyewitness Johnny Starks, which was also attached to the Sheriff's Report, that: "I heard the train honking".

5. There Is No Material Variation In Union Pacific's Evidence Regarding The Sounding Of The Whistle.

Jensen's argument that Union Pacific has provided conflicting information regarding the sounding of the locomotive whistle is a red herring. Utah Code Ann. § 56-1-14 (Addendum D) does not require a particular "sequence" of whistle sounds--only that the

whistle or the bell be operated "continuously" from one-quarter (1/4) mile away on up to the crossing. On its face, this continuous whistle requirement could mean one constant blast for the entire distance without any interruption--or it could mean intermittent blasts of one length or another "continuously" for the required distance. Statutorily, it does not matter which way the engineer chooses to do it as long as he does it for the requisite distance. Accordingly, it is irrelevant whether Union Pacific's Answer to Interrogatory No. 10 dated July 22, 1994, specified that the whistle was sounded intermittently in a certain sequence of sounds and that the Statement of Facts in its Motion for Summary Judgment, based upon Engineer Puffer's later Affidavit, specified that the whistle and bell were being operated "continuously" for the required distance. Also, Jensen fails to mention that at the same time that Engineer Puffer provided his Affidavit, Union Pacific filed Supplemental Answers to Interrogatories dated February 3, 1995, which conformed its earlier Answer to Interrogatory No. 10 to Engineer Puffer's testimony in his Affidavit. (R. 271-268). Therefore, even if it were relevant, there is no inconsistency or variation in Union Pacific's facts regarding the sounding of the whistle.

6. The Speed Indicator Printout Is Not Evidence That The Whistle Was Not Sounded.

As explained in the attached Supplemental Affidavit of George E. Ohlsson (R. 259-58), the speed indicator printout fails to show that the whistle was being sounded because the design of the 8 track cassette recording device used on the locomotive is of the older type which does not have a channel for recording the whistle. Accordingly, the reason why the event recorder printout does not show a whistle is not that the whistle was not being

sounded. It was because the recorder was not designed or installed on the locomotive to do so. Jensen adduced no evidence to the contrary. Therefore, the event recorder printout is irrelevant on the issue of whether the whistle was sounded.

IV.

THE CONDITION OF THE CROSSING AT THE TIME OF THE ACCIDENT DID NOT IMPOSE ADDITIONAL DUTIES OF CARE ON UNION PACIFIC.

1. There Is No Probative Evidence That The Crossing Was More Than Ordinarily Hazardous.

Jensen's only basis for arguing a more than ordinarily hazardous crossing is her belated affidavit testimony that the auction held at the Utah Livestock Auction premises located in the southwest quadrant of the crossing intersection, which is on the opposite side of the tracks from which Jensen's automobile approached, brought additional traffic congestion and noise to the area sufficient to obstruct the view of the approaching train and obscure or muffle the warning sounds of the train's approach. Other than the contradictory testimony contained in her affidavit, Jensen has not presented even a scintilla of evidence to the effect that such obstructions were present or that they made the crossing more than ordinarily hazardous.

While Jensen now testifies by affidavit that "I noticed that there were a lot of trucks and trailers which obstructed our view of the tracks in all directions," in earlier answers to interrogatories Jensen specifically testified that she did not remember whether the view at

the crossing was obstructed. Union Pacific's Interrogatories Nos. 25 and 26 and Jensen's Answers thereto state as follows:

> 25. Describe in detail any and all obstructions to your vision of the train's approach and railroad crossing where the accident occurred at the time of the accident.
>
> Answer: I do not recall if the view was obstructed.
>
> 26. State in detail your version of how the accident occurred.
>
> Answer: I remember nothing of the accident and very little, if anything, of what happened prior to the accident.

As explained in paragraph III.1 above, for purposes of defeating a motion for summary judgment Jensen is not allowed to change previously sworn testimony in order to create an issue of fact. Jensen's affidavit testimony that the train's approach was obstructed should be disregarded.

Furthermore, there is no probative evidence regarding obstruction to view and no evidence whatsoever, either in affidavit form or otherwise, that the auction noise obscured the sound of the warning devices on the train. Accordingly, in the face of the photographs attached to the Curley Affidavit (R. 113-110), which speak for themselves, Jensen's bare allegation that the crossing was more than ordinarily hazardous does not create an issue of fact for jury consideration as a matter of law. Duncan v. Union Pacific R. Co., 790 P.2d 595 (Utah Ct. App. 1990), aff'd., 842 P.2d 832 (Utah 1992).

2. The Law Imposes No Additional Duty On Union Pacific Because Of The Nature Of The Crossing.

Jensen misstates the duty of care Utah law imposes on railroads where crossings are

or may be determined to be more than ordinarily hazardous. Initially, because all railroad crossings are by their very nature inherently dangerous, a railroad cannot be held liable for crossing conditions unless the crossing is more than ordinarily hazardous. Id. Where a crossing is or may be deemed to be extrahazardous, a railroad's duty of care may be increased thereby but is still limited to those unsafe conditions which it created or over which it has responsibility. Thus, obstructions caused or created by the railroad or located on railroad right of way may be the railroad's responsibility to abate. Gleave v. Denver & Rio Grande Western R.R., 749 P.2d 660 (Utah Ct. App. 1988); Duncan, supra. However, adjacent property owners have responsibility to remove vegetation or other obstructions on their property which constitute a "traffic hazard" (Utah Code Ann. § 41-6-19); and UDOT has been delegated the responsibility for regulating the safe travel of motorists on roads and highways, including those which pass over and across railroad tracks. Utah Code Ann. § 54-4-14 et seq.; Duncan, supra.

It is not enough for Jensen to simply allege that the crossing was more than ordinarily hazardous. She must also allege and prove the specific duty of care that was breached by Union Pacific, such as the "wild vegetation" the Denver and Rio Grande Western Railroad allowed to grow on its right of way and which obstructed the motorist's view in Gleave, supra.

Here Jensen makes the bare allegation of an extrahazardous crossing but fails to allege how Union Pacific was negligent with respect to such condition. Under Duncan, Union

Pacific had no duty to signalize the crossing. Under Easterwood, Union Pacific had no duty to reduce its speed (even though it did) below the federal limit. And obviously, Union Pacific was not responsible for any problems that may have been caused by the livestock auction which was located entirely off the right of way. As stated in Duncan:

> Plaintiff has failed to "demonstrate, or even suggest what more Union Pacific could [legally] have done to make this crossing safer, short of installing automatic warning lights and gates, which admittedly was not its responsibility.

842 P.2d at 833-34. The trial court was correct in ruling as a matter of law that Union Pacific breached no duty of care owed to the Jensen concerning the alleged unsafe nature of the crossing.

CONCLUSION

As a matter of law the federally set speed limit for the train and trackage where the crossing is located was 60 m.p.h. and there is no factual dispute that Union Pacific's train was traveling substantially under that limit. In any event, the train's speed as alleged by Jensen could not have been a proximate cause of the accident. There is no probative evidence that the train whistle and bell were not sounded as prescribed by the statute. There is no probative evidence that the crossing was more than ordinarily hazardous or even assuming that it was, that Union Pacific breached any duty of care owed to Jensen with respect to such alleged condition. Union Pacific submits that the undisputed probative facts and the applicable law show as a matter of law that the accident was not caused by any negligence on Union Pacific's part, and that the trial court was correct in granting the

Railroad's Motion.

DATED this 18th day of January, 1996.

J. Clare Williams

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of January, 1996, a copy of the foregoing was served in the manner indicated below upon the following:

Allen K. Young, Esq.
Young & Kester
101 East 200 South
Springville, Utah 84663

_____ U.S. Mail
_____ Hand Delivered
_____ Overnight
_____ Facsimile
_____ No Service

J. Clare Williams

ADDENDUM

ADDENDUM A

§ 213.9 Classes of track: operating speed limits.

(a) Except as provided in paragraphs (b) and (c) of this section and §§ 213.57(b), 213.59(a), 213.113(a), and 213.137 (b) and (c), the following maximum allowable operating speeds apply:

[In miles per hour]

Over track that meets all of the requirements prescribed in this part for—	The maximum allowable operating speed for freight trains is—	The maximum allowable operating speed for passenger trains is—
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90
Class 6 track	110	110

(b) If a segment of track does not meet all of the requirements for its intended class, it is reclassified to the next lowest class of track for which it does meet all of the requirements of this part. However, if the segment of track does not at least meet the requirements for Class 1 track, operations may continue at Class 1 speeds for a period of not more than 30 days without bringing the track into compliance, under the authority of a person designated under § 213.7(a), who has at least one year of supervisory experience in railroad track maintenance, after that person determines that operations may safely continue and subject to any limiting conditions specified by such person.

(c) Maximum operating speed may not exceed 110 m.p.h. without prior approval of the Federal Railroad Administrator. Petitions for approval must be filed in the manner and contain the information required by § 211.11 of this chapter. Each petition must provide sufficient information concerning the performance characteristics of the track, signaling, grade crossing protection, trespasser control where appropriate, and equipment involved and also concerning maintenance and inspection practices and procedures to be followed, to establish that the proposed speed can be sustained in safety.

[36 FR 20336, Oct. 20, 1971, as amended at 38 FR 875, Jan. 5, 1973; 38 FR 23405, Aug. 30, 1973; 47 FR 39402, Sept. 7, 1982; 48 FR 35883, Aug. 8, 1983]

ADDENDUM B

§ 217.7 Operating rules; filing and recordkeeping.

(a) On or before December 21, 1994, each Class I railroad, Class II railroad, the National Railroad Passenger Corporation, and each railroad providing commuter service in a metropolitan or suburban area that is in operation on November 21, 1994, shall file with the Federal Railroad Administrator, Washington, DC 20590, one copy of its code of operating rules, timetables, and timetable special instructions which were in effect on November 21, 1994. Each Class I railroad, each Class II railroad, and each railroad providing commuter service in a metropolitan or suburban area that commences operations after November 21, 1994, shall file with the Administrator one copy of its code of operating rules, timetables, and timetable special instructions before it commences operations.

(b) After November 21, 1994, each Class I railroad, each Class II railroad, the National Railroad Passenger Corporation, and each railroad providing commuter service in a metropolitan or suburban area shall file each new amendment to its code of operating rules, each new timetable, and each new timetable special instruction with the Federal Railroad Administrator within 30 days after it is issued.

(c) On or after November 21, 1994, each Class III railroad and any other railroad subject to this part but not subject to paragraphs (a) and (b) of this section shall keep one copy of its current code of operating rules, timetables, and timetable special instructions and one copy of each subsequent amendment to its code of operating rules, each new timetable, and each new timetable special instruction, at its system headquarters, and shall make such records available to representatives of the Federal Railroad Administration for inspection and copying during normal business hours.

[59 FR 43070, Aug. 22, 1994]

EFFECTIVE DATE NOTE: At 59 FR 43070, Aug. 22, 1994, § 217.7 was revised effective November 21, 1994. For the convenience of the user, the superseded text is set forth below.

§ 217.7 Filing of operating rules.

(a) Before February 1, 1975, each railroad that is in operation on January 1, 1975, shall file with the Federal Railroad Administrator, Washington, DC 20590, one copy of its code of operating rules, timetables, and timetable special instructions which were in effect on January 1, 1975. Each railroad that commences operation after January 1, 1975, shall file with the Administrator one copy of its code of operating rules, timetables, and timetable instructions before it commences operations.

(b) Each amendment to a railroad's code of operating rules, each new timetable, and each new timetable special instruction which is issued after January 1, 1975, shall be filed with the Federal Railroad Administrator within 30 days after it is issued.

ADDENDUM C

§ 229.117 Speed indicators.

(a) After December 31, 1980, each locomotive used as a controlling locomotive at speeds in excess of 20 miles per hour shall be equipped with a speed indicator which is—

(1) Accurate within ±3 miles per hour of actual speed at speeds of 10 to 30 miles per hour and accurate within ±5 miles per hour at speeds above 30 miles per hour; and

(2) Clearly readable from the engineer's normal position under all light conditions.

(b) Each speed indicator required shall be tested as soon as possible after departure by means of speed test sections or equivalent procedures.

ADDENDUM D

56-1-14. Procedures at grade crossings.

Every locomotive shall be provided with a bell which shall be rung continuously from a point not less than eighty rods from any city or town street or public highway grade crossing until such city or town street or public highway grade crossing shall be crossed, but, except in towns and at terminal points, the sounding of the locomotive whistle or siren at least one-fourth of a mile before reaching any such grade crossing shall be deemed equivalent to ringing the bell as aforesaid; during the prevalence of fogs, snow and dust storms, the locomotive whistle shall be sounded before each street crossing while passing through cities and towns. All locomotives with or without trains before crossing the main track at grade of any other railroad must come to a full stop at a distance not exceeding 400 feet from the crossing, and must not proceed until the way is known to be clear; two blasts of the whistle or two sounds of the siren shall be sounded at the moment of starting; provided, that whenever interlocking signal apparatus and derailing switches or any other crossing protective device approved by the Department of Transportation is adopted such stop shall not be required.

Provided, that local authorities in their respective jurisdiction may by ordinance approved by the Department of Transportation provide more restricted sounding of bells or whistles or sirens than is provided herein and may prescribe points different from those herein set forth at which such signals shall be given and may further restrict such ringing of bells or sounding of whistles or sirens so as to provide for either the ringing of a bell or the sounding of a whistle or of a siren or the elimination of the sounding of such bells or whistles or sirens or either of them, except in case of emergency.

The term locomotive as used herein shall mean every self-propelled steam engine, electrically propelled interurban car and so-called diesel operated locomotive.

Every person in charge of a locomotive violating the provisions of this section is guilty of a misdemeanor, and the railroad company shall be liable for all damages which any person may sustain by reason of such violation.

ADDENDUM E

J. CLARE WILLIAMS, #3490
MORRIS O HAGGERTY, #5283
Attorneys for Defendant
UNION PACIFIC RAILROAD COMPANY
406 West 100 South
Salt Lake City, UT 84101-1151

IN THE FOURTH JUDICIAL DISTRICT IN AND FOR UTAH COUNTY

STATE OF UTAH

ALECIA JENSEN, Plaintiffs, vs. UNION PACIFIC RAILROAD COMPANY Defendant.	)	**ORDER GRANTING SUMMARY JUDGMENT** Civil No. 940400280 Judge Boyd L. Park

Defendant, Union Pacific Railroad Company's Motion for Summary Judgment came on for hearing by the Court on April 17, 1995; with defendant being represented by J. Clare Williams and plaintiff, who was present in the courtroom, being represented by Allen K. Young; and with the parties having filed written briefs and exhibits and having argued their respective positions to the Court, and the Court being fully advised in the premises, now rules as follows:

The Court finds and concludes:

(1) That the speed of defendant's train was not a proximate cause of the accident;

(2) That defendant was not responsible for any conditions which may have been present at the time of the accident and created a "more than ordinarily hazardous"

crossing; and

(3) That defendant did sound the train's bell and whistle as it approached the crossing.

Therefore, the Court finds that there is no genuine issue as to any material fact to prevent it from acting on defendant's motion as a matter of law.

Accordingly, the Court hereby grants defendant's Motion for Summary Judgment and orders plaintiff's Complaint dismissed with prejudice, with each party to pay its own costs and expenses.

DATED this 9 day of June, 1995.

BY THE COURT:

JUDGE BOYD L. PARK

Approved as to form this _____ day of _____, 1995.

_____
Allen K. Young
Attorney for Plaintiff

ADDENDUM F

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

ALECIA JENSEN, Plaintiff, vs. UNION PACIFIC RAILROAD, INC., Defendant.	MEMORANDUM DECISION CASE NO. 940400280 DATE May 15, 1995 JUDGE BOYD L. PARK

This matter came before the Court on April 17, 1995 for oral argument on defendant's Motion For Summary Judgment. The Court, having received and reviewed the motion, memorandum in support, memorandum in opposition, reply memorandum, and supplemental reply memorandum; having heard oral arguments; and having reviewed the applicable law, now makes the following findings and conclusions:

1. This Court has jurisdiction to decide this case. Although plaintiff is a resident of Salt Lake County, State of Utah, defendant Union Pacific Railroad is a Utah corporation authorized to do business in the State of Utah and in Utah County, State of Utah. The accident which gave rise to this cause of action occurred in Utah County, State of Utah, and therefore jurisdiction and venue are properly vested in this Court.

2. On February 5, 1994, the parties were involved in a collision between defendant's train and plaintiff's automobile. Plaintiff was a passenger in her automobile, which was crossing the railroad tracks at approximately 5950 South 650 West in Utah County when the automobile was struck by a train owned and operated by defendant. Plaintiff alleges she suffered severe and permanent injuries as a direct and proximate result of this collision.

3. On February 7, 1995 defendant filed with this Court a Motion For Summary Judgment and an accompanying Memorandum of Points and Authorities in Support of Motion For Summary Judgment. On March 2, 1995 plaintiff filed a Memorandum in Opposition to

Defendant's Motion For Summary Judgment and a Request for Hearing on Plaintiff's Memorandum in Opposition to Defendant's Motion For Summary Judgment. On March 15, 1995 Defendant's Reply Memorandum in Support of Motion For Summary Judgment was filed. On April 12, 1995 Defendant's Supplemental Reply Memorandum in Support of Motion For Summary Judgment was filed with the Court. Oral arguments on this motion were heard on April 17, 1995.

4. The accident giving rise to this cause of action occurred at approximately 12:10 p.m. on February 5, 1994 at a public railroad crossing of defendant's Provo Subdivision mainline trackage located near 650 West and 5950 South in Spanish Fork, Utah County. At the time of the accident, plaintiff's automobile was being driven by plaintiff's boyfriend, Bruce Brinkmeier, also a minor at the time of the accident. Brinkmeier was cited for driving without a license. The train in question was an empty coal train with three locomotives and 46 trailing empty coal cars. The train weighed 1424 tons and was 2622 feet in length.

5. According to the train's engineer, the train was traveling from Milford to Provo in a southwest to northeast direction. *See* Affidavit of Ryan Puffer, defendant's Memorandum in Support, Exhibit D. The trackage at that location is relatively straight and flat. *See* Affidavit of Lawrence Curley, defendant's Memorandum in Support, Exhibit B, at ¶ 5(e). Plaintiff's automobile was traveling southbound on 650 West. The road (650 West) is straight and flat for hundreds of feet before reaching the crossing. *Id.* The trackage and road intersect at an angle greater than 90 degrees with reference to the directions of approach of the train and car. *Id.* at ¶ 5(a).

6. The crossing is located in a rural farming area and is surrounded by open fields on the approach side. A Utah Livestock Auction building and animal pens are located in the southwest quadrant of the crossing intersection, which is on the opposite side of the tracks from which plaintiff's automobile approached. The northwest quadrant, which is the view quadrant for the approaching train and car, is an open field. *See* Affidavit of Lawrence Curley, defendant's Memorandum in Support, Exhibit B. At the time of the accident, a

livestock auction was taking place. There was a considerable amount of traffic, and trucks and trailers were parked near the crossing.

7. An advance stop sign warning sign was posted alongside 650 West approximately 572 feet north of the crossing. Also posted were an advance railroad crossing warning sign, an advance railroad crossing sign painted on the road, railroad crossing "crossbuck" signs, and a stop sign. *See* Affidavit of Lawrence Curley, defendant's Memorandum in Support, Exhibit B.

8. Defendant alleges that its engineer began sounding the locomotive whistle and bell approximately 1/4 mile away from the 5950 South crossing and continued to sound them up to the point of the accident at the 650 West crossing. *See* Affidavit of Ryan Puffer, ¶¶ 7-8, defendant's Memorandum in Support, Exhibit D. The distance between the 5950 South and 650 West crossings is approximately 1,100 feet. *See* Affidavit of Lawrence Curley, defendant's Memorandum in Support, Exhibit B, at ¶ 5(b).

9. At about the time the train passed over the 5950 South crossing, the engineer noticed a truck pulling a horse trailer begin to drive over the tracks in a southbound direction. Shortly after seeing the truck/horse trailer clear the crossing, the engineer noticed plaintiff's automobile rolling towards the crossing. The car was following a few seconds behind the truck/horse trailer and moving past the stop sign. The engineer placed the train in emergency braking immediately upon seeing the car. *See* Affidavit of Ryan Puffer, ¶¶ 9-11, defendant's Memorandum in Support, Exhibit D.

10. The train was a few hundred feet from the crossing when the engineer first saw plaintiff's car approaching the intersection. *See* Affidavit of Ryan Puffer, ¶ 10, defendant's Memorandum in Support, Exhibit D. It took the train approximately 1,400 feet to stop after emergency braking was initiated. *See* Affidavit of Lawrence Curley, defendant's Memorandum in Support, Exhibit B, at ¶ 5(g). The left side of the snowplow of the leading locomotive struck the right front portion of the car. *See* Affidavit of Ryan Puffer, ¶ 10, defendant's Memorandum in Support, Exhibit D; Affidavit of Lawrence Curley, defendant's

Memorandum in Support, Exhibit B, at ¶ 4(g)-(h). Both occupants were ejected from the car and thrown in the same northeasterly direction. Neither occupant was wearing a seatbelt.

11. Defendant alleges that plaintiff and Brinkmeier played a "wish" game upon arrival at the crossing, lifting their feet from the floor of the car and looking for something metallic within the car to touch with their fingers while simultaneously making a wish and crossing the tracks. Plaintiff admits this, but asserts that she has no recollection of doing so just prior to the collision. The parties agree, for the purpose of the summary judgment motion, that plaintiff and Brinkmeier never saw or heard the train prior to impact.

12. The parties agree that the "authorized speed limit" for the trackage in question was set by the Federal Railroad Administration (FRA) at 60 m.p.h. for freight trains and 80 m.p.h. for passenger trains. However, defendant Union Pacific voluntarily filed with the FRA a lower "timetable" speed of only 50 m.p.h. for its freight trains. Plaintiff argues that it is this timetable speed that applies rather than the FRA's authorized speed limit of 60 m.p.h.

13. Defendant claims that the train was traveling between 49 and 51 m.p.h. for at least the last three miles before the engineer initiated emergency braking. *See* Affidavit of Ryan Puffer, ¶ 5, defendant's Memorandum in Support, Exhibit D; Affidavit of George E. Ohlsson, ¶ 7, defendant's Memorandum in Support, Exhibit F. Plaintiff argues that the train was traveling an average speed of 51.5 m.p.h. for the three minutes prior to the collision. *See* Affidavit of Dennis Andrews, ¶ 8, Plaintiff's Memorandum in Opposition, Exhibit 2.

14. Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* U.R.C.P. 56; *Ehlers & Ehlers Architects v. Carbon County*, 805 P.2d 789 (Utah Ct. App. 1991). Furthermore, "[a]lthough summary judgment may on occasion be appropriate in negligence cases, it is appropriate only in the most clear-cut case." *Ingram v. Salt Lake City*, 733 P.2d 126, 126 (1987) (citing *Bowen v. Riverton City*, 656 P.2d 434 (Utah 1982)).

15. Defendant's Motion For Summary Judgment addresses three areas of analysis: 1) Union Pacific was not negligent in traveling in excess of the timetable speed limit; 2) Union Pacific did not fail to reduce the speed of its train through what plaintiff alleged to be a "more than ordinarily hazardous crossing"; and 3) Union Pacific complied with requirements of U.C.A. § 56-1-14, which governs the use of whistles and bells when approaching railroad crossings. The Court will analyze these issues individually.

Authorized Speed Limit

16. Although the FRA has set the speed limit for freight trains at 60 m.p.h., Union Pacific has voluntarily chosen to set a lower "timetable" speed limit of 50 m.p.h. for its freight trains, 10 m.p.h. below the speed limit mandated by the FRA. According to plaintiff's accident reconstructionist, the train was averaging a speed of 51.5 m.p.h. for the three minutes prior to the collision. *See* Affidavit of Dennis Andrews (Plaintiff's Memorandum in Opposition to Defendant's Motion For Summary Judgment, Exhibit 2). At oral arguments, plaintiff presented a speed graph obtained from the train's recorder. That graph indicated variations in the train's speed prior to the accident, and recorded the train's speed as varying from 50 m.p.h. to as much as 52.5 m.p.h.

17. Based on data retrieved from the train's Pulse Electronics "speed recorder" device which electronically recorded the train's speed on tape prior to the accident, defendant claims that the train was traveling between 49 and 51 m.p.h. for at least the last three miles before emergency braking was initiated. *See* Affidavit of George Ohlsson (defendant's Memorandum of Points and Authorities in Support of Motion For Summary Judgment, Exhibit F); *see also* Pulse Electronic printout (defendant's Memorandum of Points and Authorities in Support of Motion For Summary Judgment, Exhibit A). In the Affidavit of George E. Ohlsson, Manager of Operating Practices for Union Pacific Railroad (*see* defendant's Memorandum in Support, Exhibit F), Mr. Ohlsson stated the following:

> It is difficult for even the most competent engineer to maintain a long and heavy train at a certain and undeviating speed. The curvature and undulation of the trackage will retard and increase the speed of a long and heavy train even though an engineer is holding a steady throttle on the locomotive. A train which travels for a number of miles at a speed which does not deviate more than one or two miles an hour is, in my professional opinion, going at a steady speed. It is simply not possible to control a train's speed any better than that.

Id. at ¶ 8.

18. Defendant argues that the FRA's "authorized speed limit" of 60 m.p.h. for freight trains preempts plaintiff's claim of excessive speed. Defendant cites *CSX Transportation, Inc. v. Easterwood*, 113 S.Ct. 1732 (1993) in support of its argument that plaintiff's claims of common law negligence are unfounded. In *Easterwood*, the plaintiff sued for the death of her husband resulting from a railroad crossing accident, alleging that CSX was negligent under Georgia law for failing to maintain adequate warning devices at the crossing and for operating the train at an excessive speed. The authorized speed limit for the track in *Easterwood* was set at 60 m.p.h. and, while conceding that the train was traveling at a speed under 60 m.p.h., Easterwood nevertheless claimed that CSX breached its common-law duty to operate its train at a moderate and safe rate of speed.

19. The federal regulations involved in *Easterwood* had been issued by the Secretary of Transportation pursuant to the Federal Railroad Safety Act of 1970 (FRSA), which established an authorized speed limit of 60 m.p.h. for freight trains. A clause of the FRSA permits states to adopt or continue in force any state law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary adopted a regulation covering the subject matter of such state requirement. The preemption clause of the FRSA (45 U.S.C.S. § 434) confers on the Secretary of Transportation the power to preempt state common law. Given the Secretary's adoption of train-speed regulations pursuant to the FRSA (49 C.F.R. § 213.9(a)), a state's common-law restrictions on train speed are *not* preserved by a saving clause in 45 U.S.C.S. § 434, under which a state may continue in force an additional or

more stringent law relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard and when not incompatible with any federal law. *Easterwood*, 113 S.Ct. at 1743 (1993).

20. The Court in *Easterwood* found for CSX, who had argued that Easterwood's claim was preempted because the federal speed limits are regulations covering the subject matter of the common law of train speeds. The Court further stated that to hold otherwise would be to deprive the Secretary of the power to preempt state common law, a power clearly conferred by § 434. Therefore, the Court found that Easterwood's reliance on the common law was incompatible with both the FRSA and the Secretary's regulations. *Id.* at 1743.

21. In the case now before this Court, defendant argues that its train was traveling well below the federally imposed speed limit of 60 m.p.h. for freight trains. "The fact that the Union Pacific had set a lower 'timetable' speed limit than that specified by the FRA is irrelevant since any claim based upon a violation of the railroad set limit would be but a variation of plaintiff's common law negligence claim of excessive or unreasonable speed." *See* Defendant's Memorandum in Support at 8, ¶ 1.

22. Plaintiff argues that, because defendant filed its timetable with the FRA pursuant to 49 C.F.R. 217, the Court should consider that action as evidence that the maximum authorized speed at the intersection of the collision is 50 m.p.h. and that timetables filed with the FRA are therefore enforceable against the defendant, and train speeds in excess of those timetables violate federal law. *See* Affidavit of Bruce Reading (plaintiff's Memorandum in Opposition, Exhibit 1). Furthermore, plaintiff claims that this case is distinguishable from *Easterwood* because there is no attempt to impose on Union Pacific a state-enforced speed regulation which is more stringent than its federal counterpart. Instead, plaintiff claims that defendant's train was exceeding its own maximum authorized timetable speed, thus violating federal law, and that defendant was therefore negligent.

23. Given the ruling in *Easterwood* and the parties' arguments, the issue now before the Court is (a) whether Union Pacific's timetable speed of 50 m.p.h. for freight trains is a

variation of plaintiff's common law negligence claim of excessive speed and thus preempted by federal law governing the"subject area," or (b) whether the FRSA covers speed limits self-imposed by Union Pacific and, if not, whether defendant was negligent in exceeding its speed limit for freight trains.

24. The FRSA specifically permits states to adopt or continue in force any state law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary adopts a regulation covering the subject matter of such state requirement. This legislation was designed to prevent states from interfering with regulations established by the FRA. In this case, it is clear that the FRA had designated an "authorized speed limit" of 60 m.p.h. for freight trains traveling along this stretch of track. However, the State of Utah has not attempted to impose a more stringent law, rule, or regulation regarding authorized train speed. Instead, Union Pacific has created its own timetable speed of 50 m.p.h. The Court finds the present case to be distinguishable from *Easterwood*, where the State of Georgia tried to impose law, rules, or regulations governing train speed. The Court in *Easterwood* did not explain how the FRSA addresses the question of timetable speeds which are a) self-imposed by railroad companies and not by States; and b) lower than the federally authorized train speeds.

25. In his affidavit, plaintiff's witness Bruce Reading alleges that, under federal law, each railroad company is required to file a copy of its Operating Rules and Timetables with the FRA, and concludes that the speed limits mandated in the Union Pacific Railroad Company Operating Rules and Timetables thus become the federally mandated guidelines and maximum speed limits for the railroad company and are enforceable by the FRA. *See* Affidavit of Bruce Reading, ¶¶ 4-9, Plaintiff's Memorandum in Opposition, Exhibit 1. Accordingly, Union Pacific's self-imposed timetable speed of 50 m.p.h. would become its federally authorized speed and could not be preempted by the FRA.

26. Defendant argues that 49 C.F.R. § 217 does not authorize timetables to change the federal speed limits set in 49 C.F.R. § 213.9 and that timetable filings therefore have no

effect on the maximum speeds at which a railroad may operate its trains. According to defendant, section 217 requires only the filing of operating rules and timetables, which may or may not contain speed limits, and does not require that speed limit changes be filed with the FRA. Defendant again turns to the *Easterwood* decision and argues that it is § 213.9 which sets the "ceiling" or "maximum" speed, not timetables, and asserts that "[i]mplicit in such holding is the understanding that while a railroad may not exceed such limit, it may by internal fiat voluntarily operate its trains at any slower speed deemed appropriate." *See* Defendant's Reply Memorandum in Support at 4.

27. The *Easterwood* case does not provide any clear rule as to how one should address the issue of timetable speeds within 49 C.F.R. §§ 217 and 213.9. However, plaintiff has equally failed to provide any case law which would substantiate her claim that Union Pacific's timetable filing under § 217 has an effect on the maximum speed at which a railroad may operate its train under § 213.9. Defendant has provided the Court with the recent case of *Southern Pacific Transp. Co. v. Public Util. Comm'n of Oregon,* 9 F.3d 807 (9th Cir. 1993), which supports defendant's argument that the FRA, by requiring Union Pacific to file its timetable speed limits, does not thereby adopt that timetable limit as a federal law enforceable against the railroad and preemptive of the speed limits set forth in 49 C.F.R. § 213.9. In *Southern Pacific*, an Oregon law permitted local authorities to ban the sounding of locomotive whistles under certain conditions. Southern Pacific Transportation Company argued that the state law was preempted by three federal statutes and moved for summary judgment. The state of Oregon made a cross-motion for summary judgment, claiming that its regulations were not preempted as a matter of law. Following the Supreme Court's decision in *Easterwood*, the circuit court held that the state law and regulations were not preempted by any of the three federal statutes cited by Southern Pacific and affirmed the district court's grant of partial summary judgment in favor of the State of Oregon.

28. In addressing Southern Pacific's claim that the Oregon statute was also preempted by 45 C.F.R. § 217, which requires railroads to keep their operating rules on file with the

FRA, the circuit court stated that "[b]ecause the FRA neither approves nor adopts the railroad's rules in any manner, the rules do not have the force of law and therefore cannot preempt the Oregon statute." *Southern Pacific*, 9.F3d at 812 n.5. This statement is equally applicable in the case now before this Court, in that it supports defendant's argument that 49 C.F.R. § 217 does not authorize timetables to change the federal speed limits set in 49 C.F.R. § 213.9. The railroad's rules and timetable filings submitted to the FRA in accordance with section 217 are not approved or adopted by the FRA and therefore do not have the force of law.

29. Even if defendant were bound by its timetable speed of 50 m.p.h., there still remain the questions of (a) whether Union Pacific was negligent in exceeding that speed, and (b) if the train's speed was a proximate cause of the collision.

30. The train's speed in this matter was not a causal factor unless the train could have stopped, prior to collision, from the point at which plaintiff first saw the danger. The Court agrees with the holding in *Dombeck v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 129 N.W.2d 185 (Wisc. 1964). In that case, the Wisconsin Supreme Court determined that, even under an assumption that the train's speed was negligent, such speed as a matter of law could not be causal:

> In order to be causal the train's speed must either have misled . . . the driver of the car or it must have interfered with the control and management of the train to the extent of rendering it probable that such control and management would have otherwise been effective to have avoided the collision.

Id. at 192. As to the first prong of this test, whether Brinkmeier, as driver, or plaintiff, as passenger, were misled as to the speed of the train, plaintiff stated in her affidavit that she did not see the train prior to the collision, nor did she hear the train blow its whistle or sound its horn prior to the collision. *See* Affidavit of Alicia Jensen, ¶¶ 7-8, Plaintiff's Memorandum in Opposition, Exhibit 3. In his recorded statement, Mr. Brinkmeier also stated that he did not hear the train or its horn. *See* the recorded statement of Bruce

Brinkmeier at 15, Plaintiff's Memorandum in Opposition, Exhibit 4. The Court finds that, because both plaintiff and Brinkmeier admit that they were not looking or listening for a train, and because both stated that they never saw or heard the train prior to impact, neither could have been misled as to the speed of the train in estimating its time of arrival at the crossing. As to the second prong of this test, whether the train's speed interfered with the control and management of the train to the extent of rendering it probable that such control and management would have otherwise been effective to have avoided the collision, the Court finds that plaintiff has made no argument or produced any evidence that the train could have been stopped or sufficiently slowed to have allowed plaintiff's automobile to safely cross the tracks if the train had indeed been traveling 50 m.p.h. at the time the engineer activated the emergency brakes. Defendant, however, provided the Court with the Affidavit of Ryan Puffer, the engineer. *See* defendant's Memorandum in Support, Exhibit D. In his affidavit, Engineer Puffer stated that he placed the train into emergency braking as soon as he saw plaintiff's automobile, because it was his impression that the car was not going to stop and was going to come onto the track directly in front of the train. He further stated that "[a] long heavy train takes a number of seconds, after placing it into emergency braking, before it even begins to slow down. On this occasion the train did not even begin to slow down before the accident happened." *Id.* at ¶ 11. In addition, defendant provided the Court with the affidavit of George E. Ohlsson, Manager of Operating Practices for Union Pacific Railroad Company. *See* defendant's Memorandum in Support, Exhibit F. In his affidavit, Mr. Ohlsson stated that the small difference between the 50 m.p.h. timetable speed and an actual speed of approximately 51 m.p.h. "would not have made any significant difference in terms of how far the train would have gone before slowing down or stopping after the brakes were applied. A matter of 1 m.p.h. is, in my opinion, insignificant in terms of stopping time and distance." *Id.* at ¶ 10.

31. For these reasons, the Court finds that, even if the train had been traveling one or two miles above the timetable speed limit of 50 m.p.h., the train's speed was not a proximate cause of the accident.

Dangerous Crossing

32. According to the Utah Supreme court in *English v. Southern Pacific Co.*, 45 P.47 (1896), a crossing that is "more than ordinarily hazardous" places an additional duty of care on the railroad. Plaintiff argues that several conditions existed at the time of the accident which created a "more than ordinarily hazardous" crossing. These conditions include (a) an auction barn near the tracks accompanied by the busy nature of a livestock auction; and (b) trucks and trailers parked near the crossing which may have impeded vision or caused plaintiff to not hear the train as it approached. According to plaintiff, the accident occurred during a time when the commotion and noise of a livestock auction rendered the nearby crossing "more than ordinarily hazardous."

33. More recently, the Utah Court of Appeals applied the *English* standard of "more than ordinarily hazardous" in *Gleave v. Denver & Rio Grande Western R.R. Co.*, 749 P.2d 660 (Utah App. 1988). In *Gleave*, the plaintiff was hit by an empty coal train at a crossing in Springville, Utah. The court instructed the jury that "UDOT was statutorily given ultimate responsibility for crossing design and warning and safety devices and that, accordingly, [the jury] could not find Rio Grande negligent 'based upon any defects which might exist with respect to the design of the 1600 South crossing or based upon any problems you may perceive in the lack of traffic warning devices' there." *Id.* at 663. The jury found the crossing to be more than ordinarily hazardous and then further found that Rio Grande failed to exercise reasonable care in driving the train across the roadway "given the crossing's design, its physical characteristics, and the existing warning signs." *Id.* at 664. The conditions that contributed to this "hazardous" crossing in *Gleave* included a dangerous crossing angle, a mound of earth, and a curving track.

34. In *Duncan v. Union Pacific R.R.*, 842 P.2d 832 (Utah 1992), a car containing a driver and three passengers was struck by a freight train in Tooele County on Droubay Road. While the road intersected the track at 43 degrees on the north and 136 degrees on the south, nothing obstructed the motorist's view of the tracks for several thousand feet. The Utah Supreme court in *Duncan* affirmed the trial court's finding that the "crossing was not 'more than ordinarily hazardous' because plaintiffs could not demonstrate, or even suggest, what more Union Pacific could have done to make this crossing safer, short of installing automatic warning lights and signs and gates, which admittedly was not its responsibility." *Id.* at 833. However, the *Duncan* court did reiterate the criteria used in the *English* case to determine whether a crossing would be found to be more than ordinarily hazardous:

> [A] crossing might be found to be more than ordinarily hazardous if it was in a thickly populated portion of a city; if the view of the tracks was obstructed because of the railroad itself or natural objects; if the crossing was frequented by heavy traffic so that approaching trains could not be heard; or if, for any reason, devices employed at the crossing were rendered inadequate to warn the public of the danger of an approaching train.

Id. at 834 (quoting *English*, 13 Utah at 419-20, 45 P. at 50 (1896)).

35. In light of the criteria set forth in *English* and reiterated in *Duncan*, the plaintiff in this case now argues that conditions present at the time of the accident, namely the auction barn and the traffic and commotion which accompany a livestock auction, meet the criteria of a "more than ordinarily hazardous" crossing. Plaintiff further argues that a factfinder should therefore be allowed to determine if the crossing was hazardous and, if so, whether defendant exercised reasonable care when driving the train across this particular railroad crossing.

36. While not agreeing that the crossing was more than ordinarily hazardous, defendant argues that, assuming *arguendo*, "such a scenario does not impose a duty upon Union Pacific to reduce the train's speed below the federally mandated limit." *See* defendant's Memorandum in Support at 9, ¶ 1. Defendant argues that the plaintiff in *Easterwood* also

alleged unsafe crossing conditions requiring additional warning devices. However, despite the *Easterwood* court's finding that plaintiff may have had a viable claim for an unsafe crossing, the Court found that the railroad had no duty to reduce the train's speed below the federal limit. Defendant argues that its train was traveling 10 m.p.h. below the federal limit and that because the FRA sets train speeds with crossing safety concerns already in mind, plaintiff's allegation of defendant's failure to reduce the speed of its train through the "more than ordinarily hazardous" crossing is unfounded.

37. Defendant further argues that, when a crossing is deemed to be extrahazardous, a railroad's duty of care is limited to those unsafe conditions which it created or over which it has responsibility. *See* defendant's Reply Memorandum at 13. Defendant cites *Gleave v. Denver & Rio Grande Western R.R.*, 749 P.2d 660 (Utah Ct. App. 1988), and *Duncan v. Union Pacific R. Co.*, 842 P.2d 832 (Utah 1990), in alleging that a railroad's duty of care extends only to obstructions to view or sound caused by the railroad or located on railroad right of way or property. Defendant then cites Utah Code Ann. § 41-6-19, which places a duty of care on property owners to remove vegetation or other obstructions on their property which constitute a traffic hazard by obstructing the view of any motor vehicle operator, and Utah Code Ann. § 54-4-14 *et seq.*, which delegates to the Utah Department of Transportation (UDOT) the responsibility for regulating the safe travel of motorists on roads and highways, including those which pass over and across railroad tracks.

38. This Court finds that, even if a jury could determine the existence of conditions that would make the accident site a "more than ordinarily hazardous" crossing, those conditions were not the responsibility of defendant. The noise around the auction was not something within defendant's control. The fact that there were "No Parking" signs posted around the area following the accident to prevent parked cars from obstructing drivers' views of the railroad track does not imply any lack of care on defendant's part prior to the accident, since such precautions are not the defendant's responsibility.

39. For these reasons, the Court finds that, even if the railroad crossing was a "more than ordinarily hazardous" crossing when a livestock auction was in progress, any unusually hazardous conditions resulting from the auction were not defendant's responsibility.

U.C.A § 56-1-14 (Locomotive Bells & Whistles)

40. Utah Code Ann. § 56-1-14 governs the operation of locomotive whistle and bell devices at public railroad crossings. It provides as follows:

> Every locomotive shall be provided with a bell which shall be rung continuously from a point not less than than 80 rods from any city or town street or public highway grade crossing until such city or town street or public highway grade shall be crossed, but, except in towns and at terminal points, the sounding of the locomotive whistle or siren at least 1/4 of a mile before reaching any such grade crossing shall be deemed equivalent to ringing the bell as aforesaid. . .

Id. According to defendant, where the grade crossing is in a rural area such as the one in question, the requirement is that either the bell or the whistle must be operated beginning "at least" 1320 feet from the crossing. Defendant argues that Engineer Puffer sounded both the bell and the whistle approximately 1/4 of a mile from the crossing, well in excess of the statutorily required distance of 1320 feet.

41. Plaintiff argues that neither the driver nor the passenger of the car ever heard the train's whistle or bells prior to the accident. *See* Affidavit of Alicia Jensen, Plaintiff's Memorandum in Opposition, Exhibit 3, and the recorded statement of Bruce Brinkmeier, Plaintiff's Memorandum in Opposition, Exhibit 4. Plaintiff alleges that the Pulse Electronics graph, attached to the Affidavit of Bruce Reading, indicates that no whistles or bells were sounded by the train as it approached the crossing. Plaintiff points to the statements of several witnesses who were near the crossing at the time of the accident. In their voluntary statements to police, Gerald and Whitney Hill made no mention of the train's whistle or bells at the time of the accident. Other witnesses also made voluntary statements to police and said nothing about hearing the train's whistle or bells at the time of the accident. However,

plaintiff has not provided the Court with any such statements in affidavit form, as required by Rule 4-501 of the Utah Code of Judicial Administration.

42. The failure of the Pulse Electronics graph to record the whistle or bells of the train prior to the accident is explained by George E. Ohlsson in his Supplemental Affidavit. Mr. Ohlsson stated that the event recorder device installed on the locomotive used only 8-track cassettes, which do not have sufficient channels to record everything relative to the operation of the train; specifically, the 8-track cassette does not have a channel for showing whether the horn or whistle was being sounded. *See* Supplemental Affidavit of George E. Ohlsson, ¶ 2. Mr. Ohlsson further stated that Union Pacific is beginning to replace the 8-track cassette event recorders with solid state event recorders which are capable of recording the sounding of a train's whistle. *Id.* at ¶ 4. Furthermore, there is testimony in the police record to support defendant's claim that the train did sound its whistle and bells at some point before reaching the crossing, and that there were witnesses to the accident who did hear the train's whistle and bells. *See* defendant's Memorandum in Support, Exhibit A (Voluntary Statements of Johnny Starks and Robert Craw). Ryan Puffer, engineer of the train, stated that he began sounding the whistle and the bells approximately 1/4 mile away from the crossing at 5950 South, and then continued operating the bells and whistle from 5950 South for another 1100 feet until the train reached the crossing at 650 West where the accident occurred. *See* defendant's Memorandum in Support, Exhibit C.

43. The Court finds that, despite plaintiff's reference to the voluntary statements of witnesses who said nothing about having heard the train's bells or whistle, plaintiff did not submit any affidavits to that effect in accordance with the requirements of Rule 4-501 of the Utah Code of Judicial Administration. Furthermore, there is no evidence to indicate that those witnesses were in a position to hear the bells and whistles if they had in fact been sounded. Conversely, defendant submitted the affidavit of the train's engineer, Ryan Puffer, who stated that he checked the train prior to leaving Milford to verify that the brakes, whistle, and headlights worked properly. Mr. Puffer also stated that he sounded the train's

bells and whistles for over 1/4 of a mile prior to reaching the crossing at 5950 South, and continued to sound the whistle beyond that crossing because he knew there was another crossing (the 650 West crossing) shortly beyond the 5950 South crossing. Finally, Mr. Puffer stated that he was sounding the whistle continuously as he watched the truck and horse trailer cross the tracks just ahead of plaintiff's automobile.

44. The Court finds the affidavit evidence presented is uncontradicted and that defendant did appropriately sound the train's bells and whistle as warning.

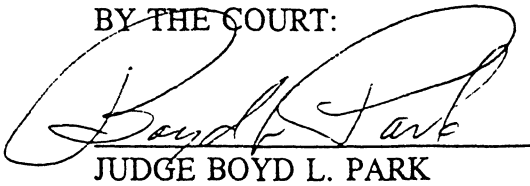
Conclusion

45. The Court concludes (a) that the speed of defendant's train was not a proximate cause of the accident; (b) that defendant was not responsible for any conditions which may have been present at the time of the accident and creating a "more than ordinarily hazardous" crossing; and (c) that defendant did sound the train's bells and whistle as it approached the crossing. Therefore, the Court finds no genuine issues of material fact remain as to defendant's liability to plaintiff. Accordingly, the Court grants defendant's Motion For Summary Judgment.

Counsel for defendant is to prepare, within 15 days of the date hereof, an order consistent with the terms of this decision and submit it to opposing counsel for approval as to form prior to submission to the Court for signature.

Dated at Provo, Utah this 15th day of May, 1995.

BY THE COURT:



JUDGE BOYD L. PARK

cc: J. Clare Williams
Allen Young